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In connection with the right of a witness to refuse to make incriminating answers, the question is apt to arise as to who is to determine whether the answer to a certain question would tend to incriminate the witness. The case of *Ex parte* Irvine, 74 Fed. Rep. 954, recently decided by the United States Circuit Court, sheds light upon this question. It was an application for a writ of *habeas corpus* from commitments issued at the instance of the trial judge, who had adjudged the petitioner guilty of contempt of court. The trial was upon an indictment for violating the interstate commerce laws. The witness refused to answer a number of questions and was ordered committed to jail. The main point discussed was in whose judgment should rest the decision as to whether the answer to a certain question would tend to incriminate the witness, and the court reached the conclusion that it would be subversive of every principle of right and justice to allow a witness to evade answering a question by the bare statement that his answer would tend to incriminate him, however unreasonable and absurd such a conclusion might be. The court said: "The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to incriminate the witness, or furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime." But the court deduced the further rule that while the decision in the first instance rested with the court, yet, "if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. In such a case the witness must himself judge what his answer will be, and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer."

The case of Jones v. State, decided by the Supreme Court of Georgia, is as peculiar in its facts as it is instructive upon a point of criminal practice regarding the offense of cheating and swindling. It seems that a little girl was intrusted with a $20 gold piece for the purpose of going to the market, buying a chicken, and returning with it and the change. The owner of the coin, through inadvertence, supposed it was a silver dollar, and the little girl was ignorant of its real value. From the evidence for the State, which the jury evidently believed, it further appeared that the little girl went to the market, purchased a chicken of the accused at the price of 25 cents, and gave him the coin. He took it, and said, "Do you want me to change all this money?" to which she replied, "It is a dollar." He turned to the light, examined the coin again, and gave a guttural sound, expressive of assent, and most probably intended to induce the child to remain in the belief that the coin was in fact a silver dollar. At any rate, he returned her in change only 75 cents, which would, of course, have been the proper amount had the coin been only a dollar. The conduct of the accused was undoubtedly, as the court says, fraudulent and criminal. The question is, was it larceny or cheating or swindling. He was indicted for and convicted of the latter offense, and in the opinion of the court this was legal and proper. Though ignorant of its true value the girl intended to pay, and did in fact pay, the $20 gold piece to the accused. She parted with it voluntarily, and up to this point no fraud, deception or dishonesty of any kind had been practiced upon her by the accused. He was rightly in possession of the coin and had an

inchoate title to it, which would immediately have become complete and perfect if he had returned the proper amount of change, as he ought to have done. Certainly, it was not delivered to him upon a trust of any description, nor did he obtain possession of it against the girl's consent. If he had handed her $19.75 her ignorance of the value of the coin she had paid to him would have been of no consequence, and the whole transaction would have been perfectly legal and regular. His fraudulent conduct began when he ascertained that the girl believed the coin to be a silver dollar. The artful practice and the deceitful means which he employed consisted in adopting the necessary precautions to keep her in this belief, and thus enable him to obtain the valuable coin, and satisfy her with the inadequate sum given back in change. His persuasive silence and equivocal assent to the girl's misstatement that the coin was only a dollar, while a less tangible form of deceitful practice than a more active form of artifice would have been, were none the less effectual in the accomplishment of his fraudulent design. Perhaps they were the most effectual means he could have employed, because allaying suspicion on the part of the girl was essential to the success of his dishonest purpose. The ingenious cheat and swindler cannot escape punishment merely because he invents and employs less clumsy means of deceit, and more cunningly pursues his artful practices, than is usually the case with less adept and skillful members of his craft. Upon these grounds the court very properly concluded that the offense was not larceny but came within the purview of the statute, defining the offense of being a common cheat or swindler.

NOTES OF RECENT DECISIONS.

ADOPTION — DESCENT AND DISTRIBUTION—RIGHTS OF ADOPTED CHILD.—The Supreme Court of Kansas in Gray v. Holmes, 45 Pac. Rep. 596, has accepted the doctrine that a child adopted in a sister State, in substantial compliance with its statutes, will inherit lands of the deceased adopting parent in the State of the latter's domicile on equal terms with a child of the parent born in wedlock; and holds that the heirs of an adopted child will inherit, through him, a share of the estate of the deceased adopting parent, just as if he were a child of that parent by blood. Gray v. Holmes, 45 Pac. Rep. 596. The adoption of a child in one State will confer upon it the rights of a child born in wedlock, as to inheritance from its adopting parents, not only in the State of adoption, but also in all other States, unless the laws of the latter preclude such a result. Van Matre v. Sankey, 148 Ill. 536, 1893; Ross v. Ross, 129 Mass. 243, 1880; Melvin v. Martin, 18 R. I. 650, 1894. But adoption will not confer the right of inheritance from collaterals, if contrary to the laws of the State where the property is situate. Keegan v. Geraghty, 101 Ill. 26, 1881.

MECHANIC'S LIEN—MATERIAL MAN. — In Bennett v. Davis, 44 Pac. Rep. 684, decided by the Supreme Court of California, it was held that one who agrees to furnish certain mantel tiles and grates and the appurtenances thereof and to deliver and set them in position, is a material man and not an original contractor. The court said in part:

The mantels and other materials were furnished and were erected in the house of defendant Davis, and the only question presented here is whether plaintiffs, in the purview of the mechanic's lien law, are material men or original contractors. As the court found in favor of the lien, the inquiry resolves itself into this: Is there evidence upon which the conclusion can be sustained? One was a wooden mantel, and the other what the witness called a "tiling mantel." Schutte testified that a tiling mantel is composed of numerous parts, from 150 to 10,000. "The tiling is placed in the building by attaching it to the brickwork and to the chimney. It is not nailed. It is a material part of the chimney—an integral part of the chimney itself. It is attached to the brickwork surrounding the mantelpiece. We cement it to the brickwork. It is put there permanently, and not for temporary use. They are part of the mantel proper, as much as a door is to a house." He further said that the contract was to furnish the materials and the labor necessary to put them up. They kept the mantels in their store for sale, put together as they would appear when finally put up. The brickwork was done by the contractor, but they set up the mantels, built the fireplaces and inclosed them. They agreed upon the price of the mantels with the regular grate set up.

The question is somewhat similar to that which sometimes arises under the statute of frauds, the precise issue being whether a contract is one of sale or for the manufacture of goods. Numerous decisions have been rendered in such cases, and, so far as I know, no rule universally applicable has been formulated. The cases seem generally to turn upon the relative value of the work and goods, or how far the article was modified by the work. In Bates v. Coster, 1 Hun, 400, it was said that "when the article ex-

isted in its entirety, but something is to be done to fit it for use, it is a sale." In Flint v. Corbitt, 6 Daly, 429, it was said: "When an article is exposed for sale in an unfinished state, that the finish may be done to suit a customer, it is a sale, and not a manufacture." In Fitzsimmons v. Woodruff, 1 Thomp. & C. 3, a marble mantel was sold to be set up. It was held that putting it up was a part of the delivery. In Cooke v. Millard, 65 N. Y. 353, in relation to mechanics' liens the criterion is said to be whether the work is simply done on the material to complete a delivery of them in a finished condition, the cost of the labor being included in the price of the things sold. It must be confessed that no satisfactory rule can be deduced from these cases. Each seems to assume the question at issue. The main consideration, after all, is whether the labor bestowed upon the article was merely trifling in comparison to the price. The same thing appears in the two cases decided by this court, one of which is relied upon by the appellants, and the other by the respondents. Hinckley v. Cracker Co., 91 Cal. 136, 27 Pac. Rep. 594, was a case where plaintiff contracted to furnish "and to deliver and put in place, upon foundations prepared by said Arthur Field in said structure, building and factory, a steam plant, consisting of boilers, engine, heater, feed pipes," etc. Plaintiff was held to be a material man only, and it was said: "The work done by them on the premises of defendants, in placing them in position, was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute." In La Grill v. Mallard, 90 Cal. 373, 27 Pac. Rep. 294, it was held that a person who contracts to paper and decorate several rooms in a building and furnishes the material, is an original contractor. I see little difference in the cases save in the relative amounts of material and labor. In the last case the contract was to decorate as well as to hang paper, and, further, the defendant promised to pay for the labor in decorating the building. The material used in decorating a room may be very trifling in comparison to the labor. The main point discussed in La Grill v. Mallard was whether an implied contract to pay was such a contract as is specified in the mechanic's lien law. The labor required to place the engines and machinery in proper position in the case of Hinckley v. Cracker Co., was evidently much greater than the labor performed in La Grill v. Mallard, but, relatively to the material furnished, it was much less. In the one case the material was not only the principal thing, but, compared to it, the work was trifling. In the other the work was the important matter. One of the defendants testified that some tile mantels are composed of more than 10,000 pieces, and that it sometimes requires two days to put one up. He did not say that it required two days or two hours to put up the one in question. Even had it taken two days, the labor would still have been comparatively trifling. I think the case directly within the decision of Hinckley v. Cracker Co., and therefore the judgment and order are reversed.

LIBEL—QUESTION OF LAW—CONSTRUCTION.—Urban v. Helmick, 44 Pac. Rep. 747, is a curious and instructive case on the subject of libel. It appeared there that a publication referring to plaintiffs, who were hotel keepers, was as follows: "In some localities there are hogs, called 'business men,' that want it all. I believe in buying at home, and building up our own trade and town as much as possible; as, the more business we do, the more money there is circulated at home." It was held that the meaning attributed to the word "hogs" by the article itself did not render the publication libelous *per se*. The court said in part:

The appellants (plaintiffs in the court below) were, at the time of the commencement of this action, engaged in the hotel business at Sedro, in Skagit county. The respondents Lovett M. Wood and wife were the owners of the weekly newspaper known as *The Trade Register*, published at the City of Seattle, of which newspaper said Lovett M. Wood was editor and publisher, and the respondent Ackman was associate editor. The action was instituted in the superior court for Skagit county to recover damages which appellants alleged they sustained by reason of the publication in said newspaper of the following article, written by the respondent Helmick, viz:

"Live and Let Live.

"Sedro, Wn., Nov. 15, 1894.

"Editor *Trade Register:* I am a strong believer in the old saying, 'Live and let live;' but in some localities there are hogs, called 'business men,' that want it all. I believe in buying at home, and building up our own trade and town as much as possible; as, the more business we do, the more money there is circulated at home. We have a hotel here that does not believe in that kind of business, and will not trade at home, but sends to Seattle for supplies. As this hotel gets most of its money from traveling salesmen who come to Sedro, I wish to say to them that I will not buy any goods of them or the house they represent if they stop at the Hotel Sedro from now on, or as long as they buy from Seattle or elsewhere. Neither will I buy from the Seattle house selling to them through some one else. When a business man will not trade at home, he does not deserve the patronage of the traveling public.

"Respectfully yours,

Marion Helmick, Grocer."

After setting out the article, the complaint, by way innuendo, alleges: That "defendants meant to be understood, and were understood, by all of the friends, acquaintances and patrons of these plaintiffs, and by the readers of said newspaper, and by the public generally, to charge these plaintiffs, as individuals and in the management of said hotel business, with being 'hogs,' thereby meaning that these plaintiffs, as individuals and in the management of said hotel business, were possessed of and controlled and actuated by the low, dirty, groveling, grasping, gluttonous, self-seeking and selfish instincts and characteristics of hogs or swine, and were possessed of and actuated by all of the instincts and characteristics of hogs or swine; and that said letter • • • was • • • published by said defendants with the intent thereby to provoke these plaintiffs and each of them to wrath, and to expose these plaintiffs and each of them to public hatred, contempt and ridicule, and to deprive these plaintiffs and each of them of the benefit of public confidence and social intercourse, and to injure and destroy the business of these plaintiffs; • • • and the said letter and publication thereby tended to and did expose these plaintiffs and each of them to public hatred, contempt and ridicule, and tended to and

did deprive these plaintiffs and each of them of the benefits of public confidence and social intercourse, and did greatly injure these plaintiffs and their business. · · · That these plaintiffs by the wrongful acts of the defendants aforesaid, etc., have been damaged in the sum of $2,000." Respondents separately demurred to the complaint, upon the general ground of insufficiency. The demurrers having been sustained, and appellants electing to stand upon their complaint, and refusing to amend, judgment was given dismissing the action, from which they have appealed.

There are no allegations in the complaint alleging special damages, and it is the contention of the appellants that the writing is libelous *per se*. The rule is well settled in civil actions that where the language is unambiguous, the question of whether it constitutes libel becomes a question of law to be determined by the court. Donaghue v. Gaffy, 54 Conn. 257, 7 Atl. Rep. 552; Moore v. Francis, 121 N. Y. 199, 23 N. E. Rep. 1127; Townsh. Sland. & L. (4th Ed.), Sec. 286. It is equally well settled that the language used must be given its ordinary meaning, and "the plaintiff cannot, by innuendoes, extend the meaning beyond what the words justify in connection with the extrinsic facts; and when the innuendo is not justified by the antecedent facts referred to, so that without it the words are not actionable, a demurrer to the complaint will lie." 1 Boone, Code Pl. section 163. "The language is to be understood in the ordinary and most natural sense; and · · · when the writing complained of is plain and unambiguous, the question in a civil action, whether it is a libel or not, is a question of law." Lacombe, Circuit Judge, in Morgan v. Halberstadt, 9 C. C. A. 147, 60 Fed. Rep. 592. Interpreting the article in question in the light of the rule thus laid down, we think that the appellants' explanation of the meaning and effect of the article must be rejected. The article itself furnishes its own explanation of the meaning to be given to the word "hogs." That explanation and meaning is that they do "not believe in that kind of business (that is, 'in buying at home, and building up our own trade and town as much as possible,') and will not trade at home, but send to Seattle for supplies." This is certainly no reflection upon the character of their hotel, or the kind of accommodation or refreshment which it affords. The article does not charge or impute anything immoral or criminal, nor it is calculated to expose the appellants to public hatred, contempt or ridicule, or to deprive them of the benefits of public confidence. Unquestionably, appellants had the legal right to trade in Seattle, or send there for supplies, if they deemed it to their advantage; and the publication is nothing more than "a hostile comment upon the manner in which the plaintiffs used, within the pale of the law," their right to trade where and with whom they pleased. Donaghue v. Gaffy, *supra*; Homer v. Engelhart, 117 Mass. 540. To accuse one of being deficient in some quality which the law does not require him as a good citizen to possess is not libelous *per se*. The public may disapprove of appellants' conduct in thus exercising the right to trade outside of the town where they reside; but the publication does not expose them to public hatred or contempt, in the sense or to the degree required by the law of libel.

ACCIDENT INSURANCE—EXTERNAL, VIOLENT AND ACCIDENTAL MEANS — VOLUNTARY EXPOSURE TO DANGER.—Two courts have recently passed upon interesting questions pertaining to accident insurance. The Court of Appeals of Kentucky held, in American Accident Co. v. Carson, 36 S. W. Rep. 169, that a person who is unexpectedly shot by another, without cause or provocation, is injured by "external, violent, and accidental means," within a policy insuring against such injuries, and that where a policy insures against death or injury by external, violent, and accidental means, a provision that it shall not cover intentional "injuries" inflicted by the insured or any other person refers only to non-fatal injuries. In Fidelity & Casualty Co. v. Chambers, 24 S. E. Rep. 896, decided by the Supreme Court of Appeals of Virginia, it appeared that deceased was sitting on a bag on a railroad track at a highway crossing and near a curve; that he sat with his back to the curve, conversing with another person; that a train came suddenly around the curve, and on warning deceased started up, but, reaching to get his bag, was struck by the engine. The policy expressly provided that it did not cover injuries caused by "voluntary exposure to unnecessary danger." It was held that the act of deceased was not within the exception. In this case the court said in part:

> The policy held by the deceased insured him "against bodily injuries sustained through external, violent and accidental means." That the insured came to his death "through external, violent and accidental means" is not questioned, and it only remains to be determined whether the evidence brings the case under the exception in the policy which provides that it does not cover injuries caused by "voluntary exposure to unnecessary danger." The words "voluntary exposure," as used in an accident insurance policy, imply conscious intentional exposure; something which one is willing to take the risk of. It must appear that the act, in order to come within the exception, was one which reasonable and ordinary prudence would pronounce dangerous, and that the accident was in consequence thereof. It is consequently not every act of negligence which will defeat a recovery under such a provision, and, in general, the question whether the conduct of the insured is such as to preclude a recovey is for the jury under all the circumstances of the case, and where there is a demurrer to evidence, as in this case, for the trial judge. 1 Am. & Eng. Enc. Law (2 Ed.), pp. 307, 308, and cases cited in notes 5, 6, p. 307, and notes 1, 2, p. 308. The only evidence upon this point is that of Fanny Hill (colored), a witness introduced by the defense. She says that she was talking to deceased in the county road where the railroad track crosses it. He was sitting on a bag and on the railroad track, with his back up the railroad. The train came down around the curve, when she hallowed to him, and he started off, but reached to get his bag, and as he reached to get it the engine struck him in the left side of the back. The train was coming so fast around.

the curve that it was as much as she could do to get out of the way herself. There is not the slightest evidence to show that the deceased knew that a train would be along at or near that time, nor that he had good reason to know it. The fact that he immediately got off the track when apprised that the train was coming, negatives the idea of conscious intentional exposure to danger. The most that can be made of this evidence is that the deceased, in thinking that he had time to get his bag off the railroad track, was simply mistaken. In the case of Insurance Co. v. Osborne, 90 Ala. 201, 9 South. Rep. 869, the court held that a recovery may be had on a policy of insurance against accidental injuries, or death "effected through external, violent and accidental means," when the evidence shows that the insured, running rapidly from the post-office, fifty yards distant, to get the mail for the postmaster from a railroad train, which was fast approaching, and which did not stop at the station, attempted to check his speed on getting near the train, but stumbled and fell against the steam chest of the engine, receiving fatal injuries; although the insured was not in the employ of the postmaster and volunteered to get the mail from the train, and although they were exceptions contained in the policy against "intentional injuries" and "voluntary exposure to unnecessary danger." Summerville, J., in his opinion, says: "Exceptions of this kind are construed most strongly against the insurer and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary especially in modern times to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy." The fact that a person insured against injury or death by accident was guilty of negligence which contributed to an injury received by him will not prevent a recovery on the policy. Schneider v. Insurance, 24 Wis. 28. It should be borne in mind that this is not a suit against the railroad company, where the question of contributory negligence would come in. If every negligent or careless act of the insured from which accident results without "conscious intentional exposure" on his part is to be made to serve as a defense to an action on the policy, policies of this character would become of little utility.

ANIMALS RUNNING AT LARGE.—In Elliott v. Kitchens, 20 South. Rep. 366, decided by the Supreme Court of Alabama, it was held that a colt three months old, following its dam, driven to a wagon through the streets is not "running at large" within an ordinance making it unlawful for a horse to run at large on the street. The court said in part:

In 12 Am. & Eng. Encyc. Law, 898, we find the following: "Running at large," imposing a penalty on one who suffers animals to run at large in public places, is used in the sense of strolling without restraint or confinement; as wandering, roving or rambling at will, unrestrained. Perhaps no abstract rule under the statute can be laid down applicable to every case, as to the nature, character and amount of restraint necessary to be exercised over a domestic animal when suffered to be on the highway incident to its use. But the restraint need not be entirely physical; it may depend much upon the training, habits and instincts of the animal in the particular case, and the sufficiency of the restraint is to be determined more from its effect upon, and controlling and restraining influence over the animal, than from its nature or kind. In a note the following quotation from Russell v. Cone (Vt. 604), is given: "Suppose a span of horses be so accustomed to be kept and driven together that, while the owner is riding one, the other will voluntarily follow as closely almost as if led by a halter. The owner, while taking them along the highway in this manner, could not be said to suffer the horse so voluntarily following its mate to run at large, in violation of the statute. The same may be said of a young suckling colt upon the highway, with no restraint other than instinct to follow its dam, which is being driven in a carriage on the highway." It was accordingly held that a horse accustomed to be ridden to a certain point by the owner, and then to return home alone, to a point where the owner's boy was waiting for him, and took care of him, was not "running at large," if his owner or his son kept so near that, owing to its training, it would not wander about the highway, but go directly home. A number of other authorities are quoted from in the notes, stating similar principles. Thus, a dog following his owner or engaged in the chase is not "running at large." The case of Smith v. Railroad Co., 58 Iowa, 622, 12 N. W. Rep. 619, is stated as follows: "A suckling colt, following its mother which was in the plaintiff's control, strayed, and was injured by defendant's train. Held, that the colt, under such circumstances, must be deemed to have been running at large." The fact that the colt was a suckling colt and its mother was in the control of the plaintiff, did not, we think, show that the colt was in control. It might perhaps, under ordinary circumstances, be expected to follow its mother; but there was nothing but its own inclination to restrict its freedom and prevent it from straying, and we think that it must be deemed to have been running at large." If that case be regarded as sound, it is yet distinguishable from the present. There the colt, of its own volition, strayed away from its dam, and, when injured, was at large, under no restraint of instinct or otherwise. Here the facts were that the colt was following its dam, and the defendant's horse, loose upon the street, ran after it. The colt ran along directly in front of and by the side of its dam, and plaintiff kept the horse from it by throwing chips and trash at him which he picked up in the bed of the wagon until he drove up to the foundry and got out of the wagon, when the horse got in between the colt and its mother and chased it away, causing the mare to break away from the plaintiff's control and run, with the wagon, after the colt. There was not only the restraint of instinct actually in force at the time of the injury, but there was the physical presence of the owner, actually exerting control and protection over the colt. We are of the opinion that, under the facts of this case and the principles of law above stated, the colt was not "running at large," within the meaning of the plea and the ordinance upon which it relies.

PASSENGER AND FREIGHT ELEVATORS.

ELEVATORS AS CARRIERS.

While the limited number of cases upon the subject of elevators renders impossible a thorough discussion of their classification

among carriers, there are a few distinct cases and general principles bearing upon this important subject. That elevators are carriers in the generally accepted sense of the term cannot be doubted; and it seems that the mere fact that they carry vertically instead of horizontally should not alter the application of those general rules of law which govern the construction and operation of other carriers. If any distinction is to be observed, certainly it would be that greater caution should be required of those who carry vertically, since they incur the great peril of opposing gravitation. "Elevators are carriers, and as such they may carry for the public in general, in which event they are common carriers; or they may carry only for the owner or a select few, in which case they are private carriers. Again, elevators may be operated for a consideration or gratuitously, for the carrying of both freight and passengers, or the exclusive carriage of either. The owners of public elevators have the right to adopt and observe reasonable rules for their regulation; thus, frequently in very tall buildings, elevator cars known as 'through cars' are run according to schedules permitting them to stop only at a limited number of specified floors. This is a reasonable rule and no passenger can insist that it be either violated or abolished. In these and in many other respects, the duties, rights and liabilities of the owners of elevators are the same as those of other carriers."[1]

Passenger Elevators.—It has been expressly decided that ordinary passenger elevators are common carriers, the leading case being Treadwell v. Whittier, in which the court says, in part: "The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway. * * * Persons who are lifted by elevators are subjected to great risks of life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery to help themselves. The person running such elevator must be held to undertake to raise such persons safely, so far as human care and foresight will go."

[1] Webb on Elevators, § 3.

Upon the question of proper care to be exercised by the operator of an elevator the court, in the same case, says: "The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to the control by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employment to avoid injury to those who carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed." In no employment does the law require a higher degree of care than in the construction and operation of elevators.[2] At the same time the operator of a passenger elevator is not an insurer of the personal safety of those carried. He is only required to exercise the highest degree of care ordinarily demanded in such cases. Thus in the case of Mitchell v. Marker,[3] the court said: "Care short of the highest care becomes, not ordinary care, but absolute negligence." The various facts to be considered in determining the question of care are usually for the jury to pass upon. Thus it is said in Webb on Elevators at § 6, that "It naturally follows that what constitutes the highest degree of care in one case will be so in another. The inexperience of children, the infirmity of age the inability of the lame, and all the commonly known physical weaknesses must be considered by those actually running passenger elevators; and the question of the proper observance of those facts is usually for the jury to determine."

Freight Elevators.—There have been no cases upon the particular question as to whether freight elevators may become common carriers. As a matter of fact all freight elevators are owned and operated for private purposes and such they are in law only pri-

[2] Ray on Neg. p. 308; Goodsell v. Taylor, 41 Minn. 209, 42 N. W. Rep. 873; Tousey v. Roberts, 114 N. Y. 312, 21 N. E. Rep. 399; Lee v. Knapp & Co., 55 Mo. App. 390.

[3] 62 Fed. Rep. 139; see Bourgo v. White, 159 Mass. 216, 34 N. E. Rep. 191.

vate carriers. There is no doubt that if as a matter of fact a freight elevator was erected for the purpose of serving the public or any considerable portion of the public it would in law be considered a common carrier of goods and be subject to liabilities as such. Of course as mere private carriers the operators of freight elevators are responsible for negligence resulting in injury to their employees or even strangers.

CONSTRUCTION OF ELEVATORS.

In the construction of elevators the utmost prudence must be exercised to protect employees and passengers.[4] Suitable materials must be used and competent workmen employed.[5] While the employment of a competent contractor is a fact indicating the exercise of due care by the owner in the construction of the elevator, it is not conclusive proof of due care for if it be further shown that the contractor, although competent was actually negligent in the construction of the elevator which was accepted by the owner, the owner is responsible for any resulting injury, not caused by contributory negligence.[6] Even trespassers and licensees are entitled to protection against willful negligence in the construction of elevators. This was expressly decided in the case of Springer v. Byram,[7] in which it was held that a newsboy who had been forbidden to ride on the elevator could not recover damages for injuries received while on the elevator, unless he had been willfully injured. "In determining whether the owner exercised due diligence in making the elevator reasonably safe, the usage of others is not the sole criterion, and it cannot be concluded that, as a matter of law, due diligence has been employed because the elevator is such as is ordinarily used for like purposes by reasonably prudent men."[8] In Goodsell v. Taylor,[9] where the plaintiff was suing for an injury caused by the breaking of the cable in the defendant's elevator, the court said: "The question to what extent the apparent wear impaired the strength of the cable might have been one for an expert, but as held in Mantel v. Chicago, etc., Ry. Co.,[10] whether due care requires this or that to be done is not a question for expert testimony. Whether prudence required an examination of the cable was for the jury to determine, upon the facts and circumstances of the case." Upon this point it is said in Webb on Elevators at § 14, that "in all cases except where the failure to exercise care is in violation of some statute, or willful or such reckless disregard for the personal safety of others as to amount to negligence *per se* the questions of fact arising in the case and the estimate of prudence are for the jury to determine. In accord with this general rule it was held proper for the case to go to the jury where the proof tended to show that the accident was due to the faulty construction of the machinery. McGongle v. Kane, 20 Colo. 292, 38 Pac. Rep. 367. Again, where the method of attaching the hoisting rope was defective and unsafe, Malone v. Hawley, 46 Cal. 409. And again, where a cable which had been used three or four years had worn some where it could have been seen if properly looked after. Goodsell v. Taylor, 41 Minn. 207, 42 N. W. Rep. 873." In all cases the owner must have either had knowledge or a reasonable opportunity to acquire knowledge of the defects in the elevator.[11] Thus in Robinson v. Wright,[12] the court said: "The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. Machinery well constructed, and apparently safe, and having been tested by use, often gives way from some hidden or unknown defect."

Proximate Cause.—In the case of Gibson v. Leonard,[13] it was expressly held that in order to maintain an action for an injury caused by the defective construction of an elevator it must be shown that the defect of which complaint is made was the proximate cause of the injury. Thus, in a case where it was proved that on an occasion several months before the time of the injury complained of, a piece of the elevator machinery

[4] Goodsell v. Taylor, 41 Minn. 209, 42 N. W. Rep. 873.

[5] McGongle v. Kane, 20 Colo. 292, 29 Pac. Rep. 367.

[6] Treadwell v. Whittier, 80 Cal. 595, 5 L. R. A. 498.

[7] 137 Ind. 15, 23 L. R. A. 244.

[8] Webb on Elevators, § 9; citing Lee v. Knapp & Co., 55 Mo. App. 390; McCormick Harvesting Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. Rep. 588.

[9] 41 Minn. 207, 42 N. W. Rep. 873.

[10] 33 Minn. 62, 21 N. W. Rep. 853.

[11] Black v. Ontario Wheel Co., 19 Ontario Rep. 578; Turnier v. Lathers, 36 N. Y. S. Rep. 821.

[12] 94 Mich. 283.

[13] 143 Ill. 182, 32 N. E. Rep. 182.

had dropped, and that, although since that time the elevator had been in constant use without accident, it would at times get out of the guides when not heavily loaded. The unexplained breaking of a clamp, to which was attached the ropes holding the elevator, was the cause of the accident. In this case it was held that the plaintiff was properly nonsuited.[14]

Unguarded Elevator Wells.—While an elevator well is in course of construction it can only be safely guarded with difficulty, and persons approaching it must exercise care commensurate with the apparent danger, or they will, if injured, be considered guilty of such contributory negligence as will bar their right to recover damages.[15] Thus, in the case just cited, the court in passing upon the facts, said: "The men were at work upon the hoist. The evidence is uncontradicted that it was impossible to guard the hole while the men were at work. The fact of the men working on the hoist was present to the plaintiff's mind because it was while observing them that he went into the hole. There is no evidence at all from which it could be reasonably held that the hole was not guarded as far as it was practicable under the circumstances. Assume a case of a hole being cut in the floor for the purpose of putting in a hoist, and while the men were at work upon the hole a man looking at them should carelessly walk into it. Could it be said that such hole should have been securely guarded against him? It would be securely guarded as far as practicable. In other words, would it have been practicable to have guarded the hole while the men were at work cutting it out and placing in the hoist? Must not one keep away from such a place, or if he go to it, take the risk of being there?" The right to construct elevators opening upon or very near to streets has been questioned. "At common law, occupiers of land were entitled to make excavations therein even of a dangerous character, and near to public highways. In all the States where this common law rule has not been repealed by statute the builders of elevators with openings upon or near streets incur no liability to passers-by or trespassers who turn in and receive injuries. Where this rule prevails, the occupier of land becomes responsible to another injured thereon only where that other has been either expressly or impliedly invited to enter."[16]

Railings, etc.—While passenger elevators are generally so constructed as to be enclosed it has been held that freight elevators need not be sheathed.[17] But the weight of reason and the indirect tendency of authority is to the effect that freight elevators should be guarded by a substantial railing in proper position, if not by a more effective enclosure.[18] In a few of the States special statutes require that elevators be so protected and of course a failure to perform such statutory requirements, is negligence *per se*.[19]

Safety Appliances.—There have been no decisions holding that the omission from elevators of safety appliances is negligence *per se*. In some of the States their use is required by statute. Where the want of such appliances is the cause of injury it must be shown that the plaintiff did not know, or was under no obligations to know, of their absence. In Hansen v. Schneider,[20] where an employee of the defendant was injured while riding on a freight elevator, the court said: "This elevator had not been supplied with a safety clutch, which was described to be a bolt or ball connected with a heavy spring kept in tension by a rope, which when slack or broken permitted the spring to shoot the bolt into the slides in the side posts on which the elevator is guided, locking it firmly and immovably there. And it was for the want of this appliance that the defendants were prosecuted to recover indemnity for the injuries. But the defendants were not shown to have been aware of the fact that the elevator had not been provided with this or any other clutch. And the premises had not been so long in their possession or subject to their inspection, as to subject them to the charge of negligence for not ascertaining that this was its condition." It is well settled that the owners of elevators are under no ob-

[14] Lawson v. Merrall, 69 Hun, 278, 23 N. Y. S. Rep. 560.

[15] Headford v. The McClary Mfg. Co., 23 Ontario Rep. 335.

[16] Webb on Elevators, § 16; citing McIntire v. Roberts, 149 Mass. 450, 4 L. R. A. 19; and Whittaker's Smith on Neg. (2d Ed.), p. 80.

[17] Hoekmann v. Moss Engraving Co., 23 N. Y. S. Rep. 787, 4 Misc. Rep. 160.

[18] McCormick Harvesting Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. Rep. 588.

[19] Whittaker's Smith on Neg., p. 55.

[20] 58 Hun, 60, 11 N. Y. S. Rep. 347.

ligations to passengers to put safety appliances on freight elevators, which are not to be used for carrying passengers.[21]

OPERATORS OF ELEVATORS.

The exact legal duty of an operator of an elevator depends upon the special concomitant circumstances and the general rules of law. In Webb on Elevators, at § 32, it is said: "Although not insurers, operators of elevators are charged with the utmost human prudence in caring for the safety of the lives and limbs of all who lawfully enter or approach their elevators. They are bound to employ competent servants, keep the entrances and immediately adjoining floors sufficiently lighted, and exercise due care in the performance of every act incident to the running of elevators. Thus, in Mitchell v. Marker, 62 Fed. Rep. 139, it was held, that a landlord who runs an elevator for the accommodation of his tenants and their visitors must use the highest degree of care which human foresight can suggest, not only as to the conduct of his servants, but as to the condition of the machinery. See Gordon v. Cummings, 152 Mass. 513, 9 L. R. A. 640. This case suggests the general rule that operators of elevators are liable for accidents caused by their want of reasonable diligence in looking after the condition of the machinery and appliances. See Heske v. Samuelson, 12 L. R. Q. B. Div. 30, 53 L. J. Q. B. Div. 45; Bier v. Standard Mfg. Co., 130 Pa. St. 446." To establish the liability it must be clear that the operator of the elevator owed some duty or was under some legal obligation to the person injured. Such duty or obligation may be imposed by law or created by contract.[22] In the case of Billows v. Moors,[23] where the wife of the janitor of a hotel went, at the request of her husband, to the roof by a stairway, for the purpose of showing a new tenant where to hang clothes; but in returning used a freight elevator for her own convenience, and was injured by reason of its defective condition it was held that the plaintiff was a "volunteer, using the elevator without any authority or license whatever from the defendant for the purpose of assisting her husband, and that the defendant owed no duty to her to see that the elevator was in a safe condition, but only to abstain from willful injury to her." As to whether plaintiffs in negligence cases are bound to prove themselves free from negligence the rules in the different States vary. The State courts seem to be about equally divided upon this question. The rule in California is fully stated in the leading case of Treadwell v. Whittier,[24] in which the court said: "The law requires proof that the plaintiff has sustained an injury by the breaking of the machinery by which he is carried or transported, and that such machinery was under the control and management of the defendant, when plaintiff has made such, he has made out a case which entitled him, if not rebutted or disproved, to recover of the defendant. The plaintiff by such proof has made a case showing negligence on the part of the defendant. The burden is then thrown on the defendant to show that he was not guilty of negligence for which he could be charged. This can be done by going into proof of the manner in which the hurt occurred, and showing that it was caused by an inevitable casualty for which the law imposes on him no responsibility, or by establishing any fact which relieves him of responsibility.

Tenants in Common.—Where several tenants of a building have equal rights to operate an elevator therein each tenant is responsible for his own negligence, but not for the negligence of any other tenant.[25] This rule releases all tenants from liability where a tenant was injured by his own negligence. Again, where a person entering a building is injured by inadvertently falling through an elevator which was used in common by the tenants no presumption of negligently leaving the elevator exposed can be raised against any one of the tenants, but positive proof must be made to maintain an action for resulting injury.[26] It is not enough for the plaintiff to prove the fact of the accident and injury having happened; but it must be shown that the injury was the direct result of some particular act or acts of the defendant.[27]

Injuries to Passengers.—Carriers of pas-

[21] Kern v. De Castro & Donner Sugar Refining Co., 125 N. Y. 50, 25 N. E. Rep. 1071, reversing 5 N. Y. S. Rep. 548.

[22] See Troth v. Norcross, 111 Mo. 630.

[23] 162 Mass. 42.

[24] 80 Cal. 582, 5 L. R. A. 498.

[25] Donnelly v. Jenkins, 58 How. Pr. 252; Kent v. Todd, 144 Mass. 478, 11 N. E. Rep. 734.

[26] Harris v. Perry, 89 N. Y. 308.

[27] Davidson v. Davidson, 46 Minn. 117, 48 N. W. Rep. 560.

sengers by elevators are required to exercise the highest degree of human prudence for the personal safety of the passengers. Every reasonable precaution must be observed in the protection of passengers from danger. Thus, it has been held that passengers should be allowed time to adjust themselves on the car and obtain their balance before the elevator was started swiftly upward.[28] Upon this point, in the case of McGrell v. Buffalo Office Bldg. Co.,[29] where a female child was going up on an elevator provided only with side pieces for passengers to hold to, the court said that on account of the peculiar construction of the car the conductor "was aware that the child was quite likely to lose her equilibrium if he started the car rapidly. He knew, or should have known, that she was to be thrown on the floor of the car. His observation had taught him that strong adults were liable, as the car starts, to lose their balance, and are frequently compelled to step about in the car to prevent falling." As further illustrating the particular acts of caution required of those who operate elevators, the case of Mitchell v. Keane,[30] is an interesting one. The facts in brief were, that the plaintiff having some telegrams to deliver in the defendant's building, entered the elevator car and showed the telegrams to the motorman, who looked at them, handed them back and raised the elevator to the third floor where it stopped and the plaintiff put out his foot waiting for the door to be opened when the motorman started the elevator without notice to the plaintiff whose foot was caught on the top of the door and injured. It was held that the evidence was sufficient to support a verdict for the plaintiff. Contributory negligence by the passenger of course bars recovery of damages. This has been expressly decided in Man v. Morse,[31] and Ballou v. Callamore.[32]

Injuries to Employees.—"It is the duty of operators of elevators to duly instruct employees working either on or about their elevators so that such employees may have a reasonable opportunity of knowing the risks and danger of their employment. It is the duty of each employer to specially warn those in his employment of any risks or dangers peculiar to the elevator or elevators on which or about which they are employed. Connors v. Morton, 160 Mass. 333. However, should an employee have all the knowledge both general and special, which employers are ordinarily required to impart, this is sufficient and the employer is not required to give him the usual notices and instructions. See Hart v. Naumburg, 123 N. Y. 641, 25 N. E. Rep. 385; reversing 3 N. Y. S. Rep. 227. It is the duty of the operator of an elevator to use due care to protect the employees against injury from defects in the machinery, to promptly repair discovered defects, to employ careful persons to work on or near the elevators and to use care for the protection of repairers while at work. Donovan v. Gay, 100 Mo. 440, 11 S. W. Rep. 44."[33] The duty of the employer to furnish safe machinery in such cases is well stated in Burns v. Sennett & Miller.[34] Of course the employer must have knowledge of the material impairment of the elevator or at least a reasonable opportunity for acquiring such knowledge.[35] And the employee does not assume the risk of latent defects.[36] The employment of minors to operate elevators has been forbidden by statute in a few of the States; but where no such statutes exist the rule is that their safety must be looked after care which is commensurate with their age, experience, and opportunities for observation.[37] It is not determined that judicial notice of the incapacity of children to run elevators can be taken by courts; but there are cases when such notice should be taken.[38]

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[28] Mitchell v. Marker, 62 Fed. Rep. 140.
[29] 70 N. Y. St. Rep. 372.
[30] 87 N. Y. 266, 33 N. Y. Sup. Rep. 1045, 67 N. Y. St. Rep. 731.
[31] 3 Colo. App. 359.
[32] 160 Mass. 246.
[33] Webb on Elevators, § 51.
[34] 99 Cal. 363.
[35] Robinson v. Wright, 94 Mich. 283; O'Brien v. Sanford, 22 Ontario Rep. 136.
[36] Fairbank Canning Co. v. Innes, 24 Ill. App. 35.
[37] O'Brien v. Sanford, 22 Ontario Rep. 136.
[38] See Smillie v. St. Bernard Dollar Store, 47 Mo. App. 407.

CRIMINAL LAW — ARSON — WHAT CONSTITUTES—OWNERSHIP.

PEOPLE V. DE WINTON.

Supreme Court of California, July 22, 1896.

1. The common law rule that a person who burns his own house while in possession thereof, does not commit arson, is not changed by Pen. Code Cal. Sec.

447, which defines arson to be "the willful burning of a building with intent to destroy it;" such section being impliedly restrained by Sec. 452, which exempts from the common law rule a case in which a person other than the owner is in lawful possession of the premises when burned.

2. Under the same provisions the fact that a building fired by the owner, is so situated that the burning thereof endangers the lives of the inhabitants of adjoining buildings, does not make the owner guilty of arson.

3. An indictment against the owner of a building for arson, must show that the building was in the occupancy or possession of another person.

VAN FLEET, J.: This is an appeal by the people from an order arresting the judgment upon a conviction of arson, the question being whether the indictment sufficiently charges the offense. The material part of the indictment is that "the said William W. De Winton on," etc., "at," etc., "did willfully, maliciously, and feloniously, in the nighttime, set fire to and burn a building, namely, a house then situate," etc., "the property of William De Winton, with the malicious, willful, and felonious intent then and there to destroy said building." Then follows an averment that said house was situated in such immediate proximity to inhabited buildings, occupied by human beings, as to endanger life, etc., and did then and there threaten the lives of said human beings from said fire, etc. Giving effect to the presumption which the law raises, of identity of person from identity of name (Code Civ. Proc. § 1963, subd. 25), and it will be observed that the indictment charges the defendant with a burning of his own building. At common law, a man was not guilty of arson in willfully burning his own house, unless the house of his neighbor was thereby also burned; and this even though the burning was with intent to destroy his neighbor's house. 4 Bl. Comm. (Wend. Ed.) 221. Arson has always been regarded as essentially an offense against the security of the dwelling or habitation, rather than against the property (1 Whart. Cr. Law, § 825; 2 Bish. Cr. Law, § 24; People v. Fisher, 51 Cal. 319); and the right to destroy his own dwelling was doubtless founded upon the right which the law accords to a man of making such use of his property as he may see fit, so long as others are not thereby injured. 1 Bish. New Cr. Law, § 514. In charging arson, therefore, it was always necessary, at common law, to aver the ownership of the building burned in another; and such is the rule in this country where not changed by statute. For this purpose, one in possession or occupancy of the premises at the time of the offense was deemed the owner, but it was essential that this should be averred and shown to be other than the defendant. State v. Keena (Conn.), 28 Atl. Rep. 522. If these principles are to be applied to the present indictment, it is quite obvious that it does not charge arson. It describes the building burned as the property of the defendant, and fails to aver its occupancy or possession by any one; and, being silent, the presumption is that it was in possession and occupancy of the owner. Nor is the pleading in any way aided in this respect by the averment that the house was so situated as that the burning thereof endangered the lives of inhabitants of other dwellings. It may be that this matter would make the indictment good as a charge of attempt to commit arson, but it does not help out the statement of the principal offense. The question, therefore, arises whether our statute has so changed or modified the definition of arson as to void this requirement of the common law; and this, we think, must be answered in the negative.

Section 447 of the Penal Code provides: "Arson is the willful a nd malicious burning of a building with intent to destroy it." If this section stood alone as a definition of the offense, there might be strong ground for holding the statement of the offense in the indictment sufficient, as substantially following the language of the statute. Under that section, literally construed, the burning of any building, of whatsoever character, maliciously and willfully, whether owned or occupied by the defendant or another, would constitute the offense; and the rule of the common law that a man could not be held guilty for burning his own house would be effectually abrogated. But that this result was not contemplated, and no such radical change in the law of arson intended, is, we think, made quite clear from a consideration of section 452, which relates to the same subject. That section provides: "To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning, another person was rightfully in possession of or was actually occupying such building, or any part thereof." This section is manifestly a limitation upon the sweeping terms of section 447, and implicitly contemplates that, to be the subject of arson, the building must be at least the qualified property of another—must be at least rightfully in the possession or occupancy of another at the time of the offense. And we think that, obviously, this fact was intended to remain, as at common law, a substantive feature of the offense, which is an essential feature of its description, and must be alleged in order to charge the offense. People v. Myers, 20 Cal. 76. In that case, which arose under the statute as it existed prior to the Code (Hitt. Gen. Laws, § 1557), where the definition of arson in the first degree was, like section 447, wholly silent as to the ownership of the burned building, the court, in considering an objection to the sufficiency of the averment as to the ownership of the property, say: "It is essential that the indictment should show that the building burned is the property of another. East, P. C. 1034. And this was so held where the statute, like ours, did not say so in terms. People v. Gates, 15 Wend. 159. The allegation of the ownership of the building burned

is a part of the description of the offense. It is a general rule of criminal pleading, as well as a provision of our statute (Cr. Prac. Act, § 239), that the indictment must be direct and certain as it regards the offense charged. In this indictment it is altogether uncertain whether the building burned was the dwelling house of Lemon or the Chinaman. It may be conjectured that it is intended to assert that the general property was in Lemon, and the special property of the possession with an interest was in the Chinaman, and the statement that the Chinaman was then in the dwelling house would aid this conjecture. But the meaning of such an averment, if it were admissible to make such an averment in this form, cannot be left to rest upon conjecture or to be made out by an argument. The defendant must be distinctly informed whose dwelling house he is accused of burning. It is urged in reply that surplusage may be rejected. But no allegation which is descriptive of the identity of what is legally essential to the charge in the indictment can be rejected as surplusage." In People v. Gates, 15 Wend. 163, cited in the last case, it is said, in construing the statute of New York defining arson: "The statute does not say in terms that the house, the burning of which in the nighttime constitutes arson in the first degree, shall be the house of another, but such must necessarily be the construction. In defining arson in the third degree, the language is this: 'Every person who shall willfully set fire to or burn in the nighttime the house of another, not the subject of arson in the first or second degree,' shall be adjudged guilty of arson in the third degree. 2 Rev. St. p. 667, § 4. The legislature did not intend to require greater particularity in the offense in the third degree than in the first and second, in both of which the punishment is more severe than in the third. According to the literal construction of the section defining the offense of arson in the first degree, a man might be punished with death for burning his own house in his own possession. I apprehend such was not the intention of the legislature, but that the common law may be called in aid of the definition of the offense, particularly when taken in connection with the section above referred to, defining arson in the third degree. If this qualification should be annexed to the offense of arson in the first degree, it must be equally applicable to the same offense in the second degree; and, testing this indictment by the rules laid down in the books which have been cited, it will be found defective." In People v. Russell, 81 Cal. 617, 23 Pac. Rep. 418, this court would seem to have taken the same view of the provisions of the Code. In that case the information charged and described the building as the property of another than the defendant; and, in passing upon an objection to the sufficiency of the pleading in another particular, it is suggested that the information is drawn in accordance with the statute and is good. See, also, People v. Fisher, 51 Cal. 320, where impliedly the same construction was sustained.

From these considerations, we are of opinion that the indictment in this case did not charge defendant with arson, and that the judgment was therefore properly arrested. Order affirmed.

NOTE.—Arson at common law was the willful burning of the house of another, and the punishment was death. There were no different degrees of the offense nor qualifications as to the circumstances under which it was committed; consequently in many cases it happened that the penalty of death was inflicted for a trivial injury, while the perpetrator of a heinous moral crime went unpunished. This State of the law has been changed in England and in most of the American States by statutes which have regard to the time and motive of the offense, the nature of the premises and their ownership, and other circumtances of like kind. One of the most important changes is that which makes the owner of a building guilty of arson when he burns it with intent to injure or defraud another. In the principal case the court intimated that the statutory definition of arson was the "willful and malicious burning of a building" would be sufficient, standing alone, to change the common law rule that a person could not commit arson with respect to his own house of which he was in lawful possession; but that the legislative intent that the common law rule should stand was shown by a further provision which exempted a particular case from the operation of that rule. There are cases, however, in which terms as broad have been held not to affect the rule. Thus in State v. Sarvis (S. Car.), 24 S. E. Rep. 53 (not yet officially reported), a provision that a person who shall set fire to and burn "any house of any kind" shall be guilty of arson, was held not to change the rule, even though the owner set fire to the house for the purpose of defrauding an insurance company. The same construction was given to similar provisions in Snyder v. People, 26 Mich. 106, 12 Am. Rep. 303; State v. Lyon, 12 Conn. 486; and Spalding's Case, 1 Leach, 258. But in several of the States, the fact that the statute, in defining the crime of arson, departs from the common law definition and merely provides that the offense shall consist in willful or malicious burning of a building, without referring to the question of ownership, has been held to show an intent to create a new and distinct offense with none of its elements in any wise dependent upon the common law; and that under all such statutes an indictment will lie against a person who burns his own house. In State v. Hurd, 51 N. H. 176, a provision imposing a penalty upon one who burns "any dwelling house" was held to extend to the owner of the house. The court laid stress upon the omission of the words "arson" and "property of another" from the definition of the offense. The case of Shepherd v. People 19 N. Y. 537 (disapproving the earlier cases of People v. Gates, 15 Wend. (N. Y.) 537 and People v. Henderson, 1 Park Cr. Cas. (N. Y.) 560), contains a forciful presentation of this view. See, also, Emig v. Daum (Ind.), 27 N. E. Rep. 322. State v. Moore, 61 Mo. 276; U. S. v. McBride, 7 Mackey (D. C.), 371. This construction of similar statutes has been tacitly accepted in many cases; no question being raised to the application of the common law rule.

Nor was the owner guilty of arson at common law in procuring another to set fire to and burn his house. State v. Haynes, 66 Me. 307, 2 Am. Rep. 569; Roberts v. State, 7 Cold. (Tenn.) 359; State v. Sarvis (S. C.), 24

S. E. Rep. 53. But a person who burned his house for the purpose of burning that of his neighbor, was guilty of arson. Holmes' Case, Cro. Car. 376; W. Jones, 351; People v. Hennessey, 21 How. Pr. (N. Y.) 239. And if by willfully setting fire to his own house he burns that of his neighbor, it seems that the law will imply malice. Rex v. Probert, 2 East, P. C. 1031. If he endangers the houses of others, he is guilty of a misdemeanor. Whart. Cr. Law, § 1664. In Louisiana the common law rule has no application. State v. Rothfrischt, 12 La. Ann. 382; State v. Elder, 21 La. Ann. 157. In Vermont the statute merely reaffirms the common law. 54 Vt. 83. For the purposes of the common rule, that person is to be regarded as the owner of the premises who is in lawful possession thereof and has any kind of estate therein, without regard to questions of title or right of property. Therefore a landlord who burns his own house while in the lawful possession of the tenant, is guilty of arson. 2 East, P. C. 1023; Harris' Case, Fost. 115; Com. v. Erskine, 8 Grat. (Va.) 624; People v. Burridge (Mich.), 58 N. W. Rep. 319. And an indictment under a statute for burning "the property of another" cannot be sustained, where it appears that the defendant was in possession of the premises under a contract to purchase. State v. Fish, 27 N. J. L. 323.

Where the statute makes it arson for the owner to burn his house under certain circumstances, the existence of those circumstances must be alleged in the indictment. Fuller v. State, 8 Tex. App. 501. A conviction of defendant for burning his own house, or a house occupied by him as lessee, or under any legal interest other than a mere naked occupancy, cannot be sustained under an indictment alleging the house to be the property of another. Fuller v. State, 8 Tex. App. 501. Either the name of an occupant must be stated, or there must be other averments from which it appears that the house burned is the property of another. State v. Keena (Conn.), 28 Atl. Rep. 522. An indictment which alleges that defendant in burning his own house, endangered those of others, need not aver the names of the owners of the houses endangered. Baker v. State, 25 Tex. App. 1.

Lessees and Occupants.—At common law arson was treated as an offense against the habitation and not against the possession or ownership of the premises, or the right of property therein. Consequently a lessee stood upon the same footing as the owner, and could not be indicted for arson if he destroyed the premises. Beeme's Case, 2 East P. C. 1009; Holmes' Case, Cro. Car. 376; McNeal v. Woods, 3 Bl. (Ind.) 465; State v. Sullivan, 5 Stew. & P. (Ala.) 175. A tenant by sufferance is within this rule. The court will not inquire into the tenure or interest of the defendant. People v. Van Blarcum, 2 Johns. (N. Y.) 105. But mere residence in a house without an interest of any kind did not exempt the defendant from liability at common law. Gowan's Case, 2 East, P. C. 1027. The rule which makes the owner liable for arson, extends to lessees, they being treated as owners for this purpose. In Missouri under a statute describing arson as the willful burning of the "property another," it was held that a tenant who burned the house occupied by him, was guilty of arson. State v. Moore, 61 Mo. 276. See, also, People v. Simpson, 50 Cal. 304; Allen v. State, 10 Ohio St. 288. So where the statute defined the offense as the malicious burning of "any dwelling or other building." U. S. v. McBride, 7 Mackey (D. C.), 371. A person, occupying rooms in a flat, was indicted and convicted as accessory before the fact in setting fire to said rooms. Levy v. State, 19 Hun (N. Y.), 383. We have seen that the owner was guilty of arson at common law in burning out his lessee or other lawful occupant. But it seems that he is not guilty in burning his house if occupied by a mere trespasser. State v. Sullivan, 5 Stew. Port. (Ala.) 175. Compare State v. Toole, 29 Conn. 342, 76 Am. Dec. 602, and Rex v. Wallis, 1 Mood. C. C. 344.

Husband and Wife.—At common law neither the husband nor the wife could be convicted of arson for burning the house of the other, they being treated as one person. Rex v. March, 1 Mood. C. C. 182. And in America it has been held that this rule is not affected by a statute which gives the wife control of her separate estate. Snyder v. People, 26 Mich. 106, 12 Am. Rep. 303. But in Indiana it has been held that a wife will be guilty of arson in burning her husband's house, under a statute defining the offense as the malicious burning of "any building occupied or unoccupied." Garrett v. State, 109 Ind. 527, 10 N. E. Rep. 570; Emig v. Daum (Ind.), 27 N. E. Rep. 322. In England, under a statute making it arson to burn a building "with intent to injure another" it was held that the wife was not guilty of arson in setting fire to her husband's house with the intent to burn and destroy him, she not being regarded as "another" in law though living away from her husband. Rex v. March, 1 Mood. C. C. 182. In Washington, a statute provides that a married woman may commit arson by burning her husband's house. Laws 1891, ch. 69, p. 120. At common law a widow burning the house of her deceased husband before dower is assigned her, is guilty of arson. Rex v. Harris, 2 East, P. C. 1023.

Insurers.—The intent with which the owner set fire to his own house, seems to have been immaterial at common law, except where done to destroy the adjacent property of another. Therefore it was no arson at common law for the owner to burn his house or to procure it to be burned for the purpose of defrauding an insurer. Rex v. Spalding, 1 Leach, 218; 2 East, P. C. 1025; Rex v. Roberts, 2 East, P. C. 103; Beeme's Case, 2 East, P. C. 1026; State v. Sarvis (S. Car.), 24 S. E. Rep. 53. Most cases of arson belong to this class and statutes have been enacted nearly everywhere remedying this absurdity. A provision that arson is the burning of "any house of any kind," has been held not to change the common law. State v. Sarvis (S. Car.), 24 S. E. Rep. 53. See, also, State v. Haynes, 66 Me. 307, 2 Am. Rep. 569; Roberts v. State, 7 Cold. (Tenn.), 359. Where there is a general statutory definition of arson, and a special statute imposing a penalty for burning with intent to defraud an insurer an indictment under the general statute will not be sustained by proof that defendant burned the house at the instance of the owner to defraud the insurer. Heard v. State, 81 Ala. 55; Dedin v. People, 22 N. Y. 178; Com. v. Makely, 231 Mass. 421.

Washington, D. C. CHAPMAN W. MAUPIN.

CORRESPONDENCE.

MORTGAGED PROPERTY IN CASE OF DAMAGE SUITS.

To the Editor of the Central Law Journal:

A made a chattel mortgage to B, which covered property sufficient in value, to many times pay the debt, secured. After default in the payment of said debt, and while all the property was in the possession of the mortgagor, one piece of the property was destroyed by a railroad company. The mortgagor brought action against the company for damages for destroying the property, to satisfy his debt. Was he

the real party in interest before reducing the mortgaged property to possession? Should he have not exhausted the other property before bringing action against the company? H.

RIGHT OF PARTY TO IMPEACH HIS OWN WITNESS.

To the Editor of the Central Law Journal:

The leading article in your last issue on "The Right of a Party to Impeach his own Witness," names certain States which have legislated on this subject, but omits Wyoming. This State adopted the Massachusetts statute on February 16, 1895.

Cheyenne, Wyo. J. C. B.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 48.

Among the many noteworthy cases in this volume of selected reports are Goldthwaite v. Jarmey (Ala.), made more useful by an exhaustive note on the subject of Partnership Real Estate; Riepe v. Etting (Iowa), wherein is an interesting discussion of the Rights of Travelers on Roads and Highways; Greenberg v. Whitcomb Lumber Co. (Wis.), on the Personal Liability of Officers of Corporations to Third Persons; Burt v. State (Miss.), which has a lengthy note on subject of Reasonable Doubt in Criminal Law. There are, however, many other good cases. Published by Bancroft-Whitney Co., San Francisco.

REID ON CORPORATE FINANCE.

These two large volumes treat of a very important part of the law of corporations. Necessarily the subject is presented at more length and in greater detail than in treatises on the general subject of corporations. In a few words it may be said to contain the law as to the powers and responsibilities of public and private corporations, and their agents and officers governing their financial operations. An examination of the work cannot but impress one with the diligence of the author, and the accuracy with which he enters into the various details of the subject. The notes are very extensive and a very large number of cases are cited. The book would seem to be invaluable to banks and large financial corporations as well as to the attorneys of such. The volumes are admirably prepared, the arrangement and style being especially noteworthy. Published by H. B. Parsons. Albany, N. Y.

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This book is intended as an introduction to the study of the law. As the author expresses it "its aim is simply to take the student across the threshold and give him a general view of the treasures of learning which lie beyond." The author is an instructor in the law department of the University of Michigan. It is clearly written and in a style of expression and arrangement which will enable the student to grasp readily the elementary principles of law. Published by West Publishing Co., St. Paul.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT STATED—Settlement. — Where one interested with others in a joint property which had been sold made a settlement with one of the parties, who acted as trustee of the fund for all, and received and receipted for his share of the proceeds, with full knowledge of the basis on which the settlement was made, and of the matters which entered into it, he cannot reopen and impeach such settlement after the trustee has made settlement with the other parties on the same basis, and distributed the money.—DOWNING V. MURRAY, Cal., 45 Pac. Rep. 869.

2. ADMINISTRATION — Executors—Sale of Land.—Under power to an executrix and the executors to sell real estate, and a provision that such power is "conferred upon a majority at any time of such executors and executrix," a contract for the sale of land, signed by one executor only, is not enforceable against the estate, and hence, before ratification by a majority of the executors, may be repudiated by the grantee for fraud committed in procuring his signature.—DODGE V. TULLOCK, Mich., 68 N. W. Rep. 239.

3. ADVERSE POSSESSION. — The possession of a life tenant cannot be adverse to the remainder-man.—LUMLEY V. HAGGERTY, Mich., 68 N. W. Rep. 243.

4. APPEAL — Practice. — Questions which were not presented to and decided by the trial court cannot be presented for review on appeal.—DOWDLE V. CORNUE, S. Dak., 68 N. W. Rep. 194.

5. ASSIGNEE FOR BENEFIT OF CREDITORS. — An assignee for the benefit of creditors, who by agreement sells property seized by a creditor under an attachment against his assignor, cannot be held personally liable therefor beyond the amount realized, or which should by proper care have been realized, from its sale, less his reasonable expenses and charges.—PEOPLE'S BANK OF SPRINGFIELD V. WILLIAMS, Tenn., 36 S. W. Rep. 983.

6. ASSIGNMENT FOR CREDITORS—Reservation.—An assignment made for the benefit of creditors is void as to attaching creditors of the assignor when the assignor fraudulently reserves a part of his assigned property not exempt by law for his own benefit.—SMITH V. HUNTER, Kan., 45 Pac. Rep. 911.

7. ATTACHMENT—Sufficiency of Affidavit.—A statement in an affidavit for attachment that defendant is "indebted," instead of "justly indebted," as provided by statute, does not render the attachment invalid, where the petition is positively verified, and embodies as an exhibit a statement of the indebtedness, verified by an affidavit stating that it is just.—H. B. CLAFLIN CO. V. KAMSLER, Tex., 36 S. W. Rep. 1018.

8. ATTORNEY AND CLIENT — Privileged Communications.—Where two persons are negotiating with each other in the presence of the attorney of one of them, their communications, as between themselves, are not privileged, and either can compel the attorney to testify against the other as to their negotiations.—MURPHY V. WATERHOUSE, Cal., 45 Pac. Rep. 866.

9. BANKS AND BANKING—Special Deposits.—Plaintiff, a corporation, a depositor in defendant bank, agreed, on the request of the defendant, to keep a sum on deposit sufficient to protect certain shares of its stock deposited as collateral to secure loans made to certain of its stockholders: Held that, in the absence of evidence showing a specific agreement to that effect, the deposit could not be regarded as a change from a general to a special deposit, in trust to pay the notes secured by plaintiff's stock.—STATE BLDG. & SAV. ASSN. V. MECHANICS' SAVINGS BANK & TRUST CO., Tenn., 36 S. W. Rep. 967.

10. BANKS — Discount of Bill before Acceptance.—Where a bank discounts a draft in advance of its acceptance, it is not a *bona fide* holder for value unless it has funds in its hands which it releases or fails to withhold from the drawer because of the acceptance. —FIRST NAT. BANK OF MONROE V. WILLS CREEK COAL CO., Mich., 68 N. W. Rep. 232.

11. BENEVOLENT SOCIETY—Action on Certificate.—In an action on matured mutual benefit certificates, the defense that the suit was prematurely brought, on the ground that, under the by-laws, the treasurer could not pay them until certain proceedings were had, and that, if there was no money in the treasury to pay the certificates, an assessment would have to be made, was not available, where it did not appear that the failure to pay was for want of funds in the treasury.—WHEELER V. SUPREME SITTING OF ORDER OF IRON HALL, Mich., 68 N. W. Rep. 229.

12. BUILDING AND LOAN ASSOCIATIONS — Usury. — A contract for repayment in installments of a sum borrowed from a building association by a shareholder therein is not usurious on its face if it stipulates that on final settlement the amounts to be retained by the association shall not exceed the sum actually loaned, with interest thereon at 8 per cent. per annum, the legal rate.—TURNER V. INTERSTATE BUILDING & LOAN ASSN., S. Car., 25 S. E. Rep. 278.

13. BUILDING ASSOCIATIONS — Contract to Improve Property.—In an action by a building association on a contract to make improvements on homestead property and providing that the owner should pay therefor in installments, and for a lien against the property, and for attorney's fees in the lien, defendant, who was a grantee of the property, cannot set up as a defense to the claim for such fees that when the contract was executed the property was the homestead of the owner.—PADDOCK V. TEXAS BUILDING & LOAN ASSN., Tex., 36 S. W. Rep. 1008.

14. CHATTEL MORTGAGE — Fixtures.—Machinery necessary for the operation of a gin mill, but which is not attached thereto, and which may be removed without injury to the realty, is subject to removal under a chattel mortgage executed for the purchase price thereof, reciting that the property should be considered as chattels.—WILLIS V. MUNGER IMPROVED COTTON MACHINE MANUF'G CO., Tex., 36 S. W. Rep. 1010.

15. CONFLICT OF LAWS.—Where a suit upon a written contract executed and to be performed in another State is brought in a court of this State, the question whether or not the plaintiff's right of action is barred, being one relating exclusively to the remedy, must be determined with reference to the limitation laws of Georgia.—OBEAR V. FIRST NAT. BANK OF BIRMINGHAM, Ga., 25 S. E. Rep. 335.

16. CONTEMPT — Inability to Satisfy Judgment. — Failure of defendant to comply with a decree against him for the payment of money is not ground for attachment for contempt, where defendant is unable because of poverty to make such payment.—WALTON V. WALTON, N. J., 35 Atl. Rep. 289.

17. CONTEMPT—Refusal of Debtor to Make Disclosure. —Under How. Ann. St. ch. 278, § 8115, providing that, if any party or witness shall disobey any order of the judge or commissioner made in proceedings for disclosure, such party or witness may be punished as for contempt, the circuit court can punish for contempt a debtor who refuses to appear before the circuit court commissioner, and make disclosure. — SHEPARD V. GROVE, Mich., 68 N. W. Rep. 221.

18. CONTRACT—Building Contract—Plans and Specifications.—Where the plans and specifications for a building were accessible to the builder before he made the contract, and an examination of them would have shown that there were apparent discrepancies in them, he is bound by a provision of the contract that if any discrepancies shall be found to exist between the plans, working drawings, and specifications, the decision of the architects as to their true intent and meaning shall be final.—KELLY V. PUBLIC SCHOOL OF CITY OF MUSKEGON, Mich., 68 N. W. Rep. 282.

19. CONTRACT — Building Contracts — Actions on.— When there has not been a substantial compliance on the part of the contractor with the building contract, nor an acceptance of the building, the contractor cannot recover, in an action on the specific contract, the contract price, less allowances for the defects.—HULST V. BENEVOLENT HALL ASSN., S. Dak., 68 N. W. Rep. 200.

20. CONSTITUTIONAL LAW—Prohibiting Sale of Game. —Act 1893, No. 196, § 5, prohibiting the sale or possession for the purpose of sale of any kind of bird, game, or fish at any time when the taking, catching, or killing thereof is prohibited by law, and Act 1895, No. 223, prohibiting the sale of quail, are not unconstitutional, as interfering with interstate commerce, but are valid, as within the police power of the State.—PEOPLE V. O'NEIL, Mich., 68 N. W. Rep. 227.

21. CONSTITUTIONAL LAW — Submission of Question— Injunction.—Injunction will not lie at the instance of a taxpayer and elector to enjoin the submission to the vote of the poeple of a constitutional amendment because the submission is invalid, as such taxpayer would receive no substantial injury from such submission.—CRANMER V. THORSON, S. Dak., 68 N. W. Rep. 202.

22. CORPORATIONS — Insolvency — Distribution of Property.—The property of an insolvent corporation, when taken into possession by a receiver under the statutory provisions for the winding up of a corporation, becomes a trust fund to be divided among such creditors as may duly file their claims, on the basis of the actual indebtedness due to each.—IN RE WADDELL-ENTZ CO., Conn., 35 Atl. Rep. 257.

23. CORPORATIONS—Ownership of Stock of Another Corporation.—The fact that one corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical. On the contrary, they are separate and distinct legal entities.—EXCHANGE BANK OF MACON V. MACON CONSTRUCTION CO., Ga., 25 S. E. Rep. 326.

24. CORPORATIONS — Right of Stockholder to Sue.—A stockholder in a corporation cannot maintain an action in equity in relation to the corporate property without alleging the refusal of the corporation to sue after reasonable demand, or facts which excuse such demand; and in such case the corporation is an indispensable party, the relief, if granted, being to the corporation, and not the stockholder.—MOUNT V. RADFORD TRUST CO., Va., 25 S. E. Rep. 244.

25. CORPORATIONS—Stock.—A going corporation, authorized to increase its capital stock, may, in order to raise money, made necessary by its financial embarrassment, as an inducement to persons to purchase its mortgage bonds at their face value, give bonus stock with the bonds, without affecting the validity of the bonds as against existing or subsequent creditors of the corporation.—DUMMER V. SMEDLEY, Mich., 68 N. W. Rep. 260.

26. CRIMINAL LAW — Bastardy.—In a prosecution for bastardy defendant can only be convicted on proof of the particular act of intercourse charged in the complaint, but evidence of other acts, occurring at other

times and places, is competnnt to show the probability of the particular act having occurred.—PEOPLE v. SCHILLING, Mich., 68 N. W. Rep. 233.

27. CRIMINAL LAW—Forgery of Deed.—Forgery may be committed by making an instrument, purporting to be the warranty deed of a person deceased, conveying the land to one who was on trial for taking wood from the land of another, and made for the purpose of being used on such trial.—BENNETT v. STATE, Ark., 36 S. W. Rep. 947.

28. CRIMINAL LAW—Larceny — Silence as Admission.—The silence of one charged with larceny when questioned about the property by a person to whom he had sold it, and to whom he offered other property for sale, is proper to be shown, as under the circumstances it was incumbent on him to answer.—STATE v. MAGOON, Vt., 35 Atl. Rep. 310.

29. CRIMINAL LAW — Perjury.—The parties agreed, with the consent of the judge, that the testimony should be taken, and the case argued and submitted, before the judge in the adjoining county of the same circuit, where the judge resided: Held, that a prosecution for perjury could be predicated on false testimony given in such case.—IN RE SMITH, Mich., 68 N. W. Rep. 228.

30. EASEMENTS—Right of Way.—A right of way over the land of another is an interests in lands, and can only be created by grant, either by deed, or by prescription implying a grant.—LONG v. MAYBERRY, Tenn., 36 S. W. Rep. 1040.

31. EASEMENTS—Right of Way.—A right of way granted to one and "his heirs and assigns forever" will be held to be appurtenant to land of the grantee, though not so expressed in the deed, and not a grant in gross to the person of the grantee, when it leads to such land, and, except for use in connection with it, would be a useless *cul de sac*, and where it has, both before and since the grant, been used solely for access to such land.—HOPPER v. BARNES, Cal., 45 Pac. Rep. 874.

32. ESTOPPEL — Title to Real Estate.—A conveyance of property was made to a man and his "wife, Anna." At the time, he was a widower, his deceased wife's name having been Anna. A few days after the conveyance, he again married, the name of his second wife also being Anna, and from that time they occupied the property together. In litigation growing out of the conveyance, the wife was made a party, and treated by all parties, including her husband, as being one of the grantees, was supposed to be such by their attorney, and by the final decree was adjudged to be a joint owner of the property: Held, that, as against her grantee, who bought after the death of her husband; in reliance upon the title shown by an abstract, and the opinion of the attorney, the heirs of her husband were estopped to claim title to the property.—HARDING v. MONTAGUE, Tenn., 36 S. W. Rep. 958.

33. EVIDENCE—Carriers—Declarations by Brakeman.—The declarations of a brakeman when ejecting a person from a train are inadmissible to prove that he acted under orders from the conductor.—LYONS v. TEXAS & P. RY. CO., Tex., 36 S. W. Rep. 1007.

34. DAMAGES — Breach of Contract.—Plaintiff contracted to manufacture for defendant a certain number of bricks, for which defendant agreed to pay in installments as the bricks were delivered: Held, that for failure on defendant's part to pay the installments, thereby rendering it necessary for plaintiff to abandon the manufacture of the bricks, for want of funds, plaintiff could recover only the amount of the unpaid installments, with interest, and not the amount of profits he would have earned if he had completed the contract.—BETHEL v. SALEM IMP. CO., Va., 25 S. E. Rep. 304.

35. DAMAGES — Complaint for Personal Injuries.—Under an allegation, in a complaint to recover damages for personal injuries, that plaintiff has "necessarily expended in doctor's bills" a stated sum, evidence is not admissible to show the amount of liabilities he has incurred for such bills, but has not paid.—MCLAUGHLIN v. SAN FRANCISCO & S. M. RY. CO., Cal., 45 Pac. Rep. 839.

36. DAMAGES—Nuisance — Husband and Wife.—Damages for personal injuries to a wife being community property, for which the husband may sue, where an action by a husband to recover damages for injuries to both himself and wife by reason of a nuisance was pending at the time of his death the cause of action as to injuries to the wife survived to her, and she may be substituted as plaintiff for their recovery.—CORSICANA COTTON-OIL CO. v. VALLEY, Tex., 36 S. W. Rep. 999.

37. DEED — Delivery—Gift Inter Vivos.—The execution of a deed conveying the grantor's land to his wife, and the delivery of such instrument to a third person, with directions to hold the same till the grantor's decease and then record it, is sufficient to vest in the grantee a present title to the fee. The delivery to a third person of an instrument conveying all the donor's personal estate to his wife, with directions to hold the paper till the donor's decease and then record it, divests the latter of all control over the property, and operates as a valid gift *inter vivos*, the intention to make the gift being shown.—RUIZ v. DOW, Cal., 45 Pac. Rep. 867.

38. FEDERAL COURTS—Jurisdiction—Annulling Judgment of State Court.—The circuit court of the United States, where the requisite diverse citizenship exists, and the amount involved is over $2,000, has jurisdiction to entertain a suit and enter a decree which, as between the parties, shall set aside, annul, and vacate a judgment of a State court, and the proceedings taken and rights acquired thereunder, upon the ground that such judgment was procured by fraud, although, by the statutes of the State, exclusive jurisdiction to entertain such a suit is vested in a particular court of the State.—DAVENPORT v. MOORE, U. S. C. C. (Iowa), 74 Fed. Rep. 945.

39. GUARANTY — Contract—Statute of Frauds.—Defendant was an officer of a corporation, and a large stockholder therein. To relieve the demands of other creditors, defendant urged plaintiff to invest $1,500 in the capital stock of the corporation, and it was verbally agreed between defendant and plaintiff that plaintiff should purchase the stock, pay the money therefor to the company, and, in the event that the stock became worthless, defendant would pay to plaintiff the said sum of $1,500: Held, that defendant's undertaking was an original contract, and not within the statute of frauds.—KILBRIDE v. MOSS, Cal., 45 Pac. Rep. 812.

40. HOMESTEAD — Land — Abandonment. — Under Const. 1868, art. 2, § 32, defining the family homestead as consisting of the "dwelling house, out buildings and land appurtenant," where the dwelling house was situated on the lands of the wife, a tract adjoining, owned by the husband, which was not separated from the wife's, all being cultivated together for the support of the family, cannot be said, as a matter of law, not to be appurtenant to the dwelling house. The fact that it was rented for a year after the husband's death does not necessarily constitute its abandonment, in the absence of evidence of the circumstances or intention of the family.—MCCLENAGHAN v. MCEACHERN, S. Car., 25 S. E. Rep. 296.

41. HUSBAND AND WIFE—Community Property.—The presumption is that lands purchased during marriage are community property; and where parties claiming the property as the separate estate of the husband have not only failed to show that the husband paid for any of the land out of moneys belonging to his separate estate, but have failed to show that at the times of the various purchases he was possessed of any separate property whatsoever, the presumption becomes conclusive.—IN RE BOODY'S ESTATE, Cal., 45 Pac. Rep. 858.

42. INSURANCE—Application.—Where soliciting and forwarding applications for policies of insurance were within the scope of the duties of an agent of an insur-

ance company, and such agent undertook to prepare for another an application for insurance, and willfully inserted therein a false answer to a material question, he will be regarded in so doing as the agent of the company, and not of the applicant, and the agent's knowledge of the falsity of the answer will be imputed to the company.—CLUBB V. AMERICAN ACC. CO. OF LOUISVILLE, Ga., 25 S. E. Rep. 333.

43. INSURANCE — Contract — Writing of Policy by Agent.—The fact that a local agent of an insurance company who stated to a general agent that he desired to write a policy on his own household goods and a barn he was building, was told to write it the usual way, supplemented by the writing of a policy by the agent three months later, when the barn was completed, in accordance with the usual custom of agents in the city would not constitute a binding contract of insurance until the policy was accepted by the company.—ZIMMERMANN V. DWELLING HOUSE INS. CO. OF BOSTON, Mich., 68 N. W. Rep. 215.

44. INSURANCE—Pleading.—The defense that a suit on an insurance policy is prematurely brought, because there has not been a compliance with certain of its provisions, insisted on as a condition precedent, is properly raised by answer.—DOXEY V. ROYAL INS. Co., Tenn., 36 S. W. Rep. 950.

45. INTOXICATING LIQUORS — Soliciting Orders.—Although a given act was, by a valid municipal ordinance, made an offense against the corporation, at a time when such an act was not indictable under the criminal laws of this State, the subsequent enactment, by the general assembly of a statute making this identical act a crime or misdemeanor deprived the municipal authorities (they having no jurisdiction over State offenses) of the power to try and punish offenders for committing the act in question.—STRAUSS V. MAYOR, ETC., OF WAYCROSS, Ga., 25 S. E. Rep. 329.

46. JUDGMENT LIEN.—Under Code, § 3567, providing for judgment liens on lands of or to which the defendant is possessed or entitled at or after the date of the judgments, the judgment creditor is not a purchaser, and acquires no greater rights than the debtor, and cannot subject to his judgment lands which the debtor holds as agent for those rightfully entitled thereto.—COLDIRON V. ASHEVILLE SHOE CO., Va., 25 S. E. Rep. 98.

47. JUDGMENT—Res Judicata.—A brought an action sounding in tort, to recover damages of defendant B. Defendant pleaded the general issue, and the only question was whether or not plaintiff had himself violated the contract between the parties, and thus justified defendant in summarily ending it. On this sole issue many items of indebtedness of A to B were the subject of evidence, but they were not introduced as a basis for set-off or recoupment, because not pleaded, and were not submitted to the jury: Held, that by that action the question of A's indebtedness to B was not *res judicata*.—PERKINS V. OLIVER, Mich., 68 N. W. Rep. 245.

48. JUSTICE OF THE PEACE—Execution of Sentence.—A justice of the peace may, within any reasonable time after conviction and sentence, issue a *mittimus* to carry into effect his judgment, though his court has been adjourned without day.—SCOTT V. SPIEGEL, Conn., 25 Atl. Rep. 262.

49. LANDLORD AND TENANT—Assignment of Lease.—In the absence of an agreement to the contrary, a tenant who assigns his lease for the whole term remains liable thereon to the landlord, as surety for the assignee.—DIETZ V. KUCKS, Cal., 45 Pac. Rep. 882.

50. LANDLORD AND TENANT—Lease.—A lease of a farm by which the landlord furnished the stock on the farm and one-half the seed grain, the profits to be equally divided, does not constitute a partnership, but the parties are cotenants in the products.—WILLIAMS V. ROGERS, Mich., 68 N. W. Rep. 240.

51. LANDLORD AND TENANT—Lease of Pine Timber.—A lease of all the "pine timber" on a given area of land "for the purpose of manufacturing spirits of turpentine," etc., "for the full term of three years from the time the boxes are cut," does not necessarily mean that the term of the lease will expire at the end of three years from the date the first trees are boxed.—CARMICHAEL V. BROWN, Ga., 25 S. E. Rep. 357.

52. LANDLORD AND TENANT—Statute of Frauds.—The holding over of a tenant, after the termination of his lease, under an oral agreement, invalid as within the statute of frauds, ripens into a tenacy from year to year by the election of the landlord to receive rent for a full year, and allowing the tenant to enter upon another year, subject to the terms and conditions imposed by the original lease.—AMSDEN V. ATWOOD, Vt., 35 Atl. Rep. 311.

53. LANDLORD AND TENANT—Tenancy from Year to Year.—A tenant under a lease for one year, who holds over and continues to occupy the premises for several years after the expiration of the term specified in the lease, with the assent of the landlord, becomes a tenant from year to year, and the tenant cannot terminate the tenancy without giving to the landlord a written notice at least three months before the end of the year.—WARE V. NELSON, Kan., 45 Pac. Rep. 924.

54. LIMITATION OF ACTIONS—New Promise.—Under the settled rule in South Carolina, that where the statutory period for bringing action, counting from the original accrual of the cause of action, has expired by limitation, a new promise is itself the true cause of action, the original obligation being material only to show the consideration, such an action is governed, as to limitation, by the statute in force and applicable to the new promise, and not by one in force and applicable to the original obligation.—MILLWEE V. JAY, S. Car., 25 S. E. Rep. 298.

55. LIMITATION OF ACTIONS—Proving New Promise.—Under Code, § 2922, providing that a new promise may be shown in evidence by a plaintiff, without pleading it, to repel the bar of the statute of limitations, pleaded by defendant, on reasonable notice to the defendant before trial, it is not error to reject such evidence where no notice has been given.—NOEL V. NOEL, Va., 25 S. E. Rep. 242.

56. LIMITATIONS—Vendor and Purchasher—Fraudulent Concealment.—A fraudulent concealment of the cause of action on the part of a defendant will prevent the running of limitations in his favor in equity. A knowingly false representation by a vendor, reputed to be a man of veracity, that he has absolute title to land which lies in another county, is a fraudulent concealment that will prevent him from pleading limitations to an equitable suit by the vendee after discovering the fraud, though the latter, had he searched the record of the county in which the property was located, could have ascertained that his vendor held only a life interest.—HERNDON V. LEWIS, Tenn., 36 S. W. Rep. 955.

57. MANDAMUS—Court File — Inspection.—Where it does not appear that a suit pending in the circuit court involves, or is in any way connected with, the land that an abstractor was employed to abstract, by way of contract or otherwise, or that it is necessary to the interests of his employer that he be allowed to inspect the file of the suit, *mandamus* will not lie to compel the county clerk to allow the abstractor to inspect and copy the file before trial.—BURTON V. REYNOLDS, Mich., 68 N. W. Rep. 217.

58. MARRIAGE—Breach of Marriage Promise.—It is a good defense to an action by a woman for the breach of a promise of marriage to prove that she was unchaste, and that defendant was ignorant of that fact when he made the promise.—FOSTER V. HANCHETT, Vt., Atl. Rep. 816.

59. MASTER AND SERVANT—Injury — Negligence.—A railroad company which maintains a structure in such close proximity to its track as to endanger the lives of employees when in the proper performance of their duties is guilty of negligence, and is liable to an employee injured thereby while exercising ordinary care, and without having voluntarily assumed the risk, with

full knowledge or competent means of knowledge of the danger.—WHIPPLE v. NEW YORK, N. H. & H. R. Co., R. I., 35 Atl. Rep. 305.

60. MECHANIC'S LIEN—Filing. — As against a mortgage recorded after the filing of a mechanic's lien, but before judgment on a *scire facias* on the lien, neither the recitals in the lien, nor the judgment, are sufficient to establish the fact that the lien was filed in time.—SAFE DEPOSIT & TRUST CO. OF PITTSBURG v. COLUMBIA IRON & STEEL CO., Penn., 35 Atl. Rep. 229.

61. MINING CLAIM—Location.—Under Rev. St. U. S. § 2324, which provides that the location of a mining claim "must be distinctly marked on the ground, so that the boundaries can be readily traced," there is a sufficient identification of a lode claim where a stake or monument is placed at each corner and at the center of each end, with one or more notices of location.—HOWETH v. SULLENGER, Cal., 45 Pac. Rep. 841.

62. MORTGAGE—Foreclosure—Sale.—An agent of the holder of a mortgage, who was a non-resident, forwarded the mortgage, for foreclosure under a power of sale, to one of two claimants of the office of sheriff, under the mistaken belief that he was the legal sheriff. The other claimant who was in fact the legal incumbent, without authority of the owner of the mortgage, and without possession of any of the papers in the matter, proceeded to sell the property in accordance with the published notice of foreclosure, and while it was of the value of $600, sold it for $10.60, the amount of his costs and expenses: Held, that such sale would be set aside on the grounds of mistake and gross inadequacy of price.—STACY v. SMITH, S. Dak., 68 N. W. Rep. 198.

63. MORTGAGE — Negotiable Paper. — The maker of negotiable paper secured by mortgage is justified in paying only to the holder, and cannot assume that the paper has not been transferred. As to him, a transferee is not required to place an assignment of the mortgage on record.—WILSON v. CAMPBELL, Mich., 68 N. W. Rep. 278.

64. MORTGAGE NOTE—Negotiability.—At maturity of a note and mortgage security, assignment of which was not recorded, the assignee authorized the mortgagee to collect. The mortgagor, not knowing such note and mortgage had been assigned and were in the hands of the assignee, executed in renewal to the mortgagee a non-negotiable note and mortgage, which he assigned to another person for a pre-existing debt, without the knowledge of the first assignee, and without accounting to him: Held, that the first note and mortgage remained in force in the hands of the assignee thereof, and the second note and mortgage were subject to the defense of no consideration.—BROOKE v. STRUTHERS, Mich., 68 N. W. Rep. 272.

65. MORTGAGES — Assignment of Insurance Policy.—Where a mortgagee has taken an assignment of an insurance policy on a house standing on the mortgaged premises, as further security for the debt, and the house is destroyed before an action is begun in foreclosure, Code Civ. Proc. § 726, which provides that there can be but one action for the recovery of any debt secured by mortgage, does not apply to the insurance policy, and defendants cannot introduce into foreclosure proceedings any question concerning it.—SAVINGS BANK OF ST. HELENA v. MIDDLEKAUFF, Cal., 45 Pac. Rep. 840.

66. MORTGAGES—Construction—Payment of Taxes.—A stipulation in a mortgage requiring the mortgagor to pay all taxes that shall by any lawful authority be levied upon the mortgaged premises does not require the mortgagor to pay the taxes directed by a subsequent statute to be levied against the mortgagee's interest in the land.—FULLER v. KANE, Mich., 68 N. W. Rep. 267.

67. MORTGAGES — Sale under Power. — An owner of land executed a mortgage with a power of sale on default. Subsequently thereto, he conveyed the same land in satisfaction of a prior mortgage: Held, that the mortgage, containing a power of sale, did not pass the legal title until it was exercised, and the legal title passed by the subsequent conveyance of the mortgagor, subject to any lien which the trust deed may have given the holder thereof.—TEAM v. BAUM, S. Car., 25 S. E. Rep. 276.

68. MORTGAGE—Unrecorded Mortgage—Notice.—The articles of incorporation of a bank provided that "it is to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent." Its cashier made a loan for a customer who had money deposited therein, took the acknowledgment to the mortgage securing the loan, had possession of the unrecorded mortgage, and received two or three installments of interest, which he placed to such customer's credit, on his pass book: Held, that the knowledge of its cashier was the knowledge of the bank, affecting it with notice of such unrecorded mortgage.—CHRISTIE v. SEAERWOOD, Cal., 45 Pac. Rep. 820.

69. MORTGAGE—What Constitutes.—Plaintiff held the overdue note of defendants, secured by a mortgage on two tracts of land. Defendants authorized a real estate agent to induce plaintiff to take a deed for one tract in payment of the debt, and to secure, if possible, an agreement for a reconveyance. Plaintiff took a deed thereto, the consideration being the amount of the debt and interest, and executed an agreement for reconveyance on the payment of such amount within a certain time, the agreement expressly reciting that the transaction was not intended as a mortgage: Held, that the conveyance was an absolute conveyance, and not a mortgage.—VANCE v. ANDERSON, Cal., 45 Pac. Rep. 816.

70. MUNICIPAL CORPORATIONS—Contracts Ultra Vires. —A contract by a municipal corporation to pay money in aid of the construction of a railroad is invalid, in the absence of any authority therefor in the charter.—HIGGINS v. CITY OF SAN DIEGO, Cal., 45 Pac. Rep. 824.

71. MUNICIPAL CORPORATIONS—Defective Highways. —In an action for injuries caused by a defective highway, a complaint alleging that defendant negligently allowed said highway to become and remain in a dangerous condition, and that defendant, by the exercise of reasonable care, might have known of such condition, and thereafter had sufficient time to repair the same, sufficiently alleges notice to defendant of the unsafe condition of the highway after general issue pleaded.—MOODY v. SHELBY TP., Mich., 68 N. W. Rep. 259.

72. MUNICIPAL CORPORATION — Defective Sewers.—Where a city has exercised its statutory authority to construct a sewer, it must keep it in proper repair, even though it was properly constructed in the first instance; and where it has notice of its condition, or by the use of reasonable diligence could have known it, the city is liable for damages to adjacent property owners, where the condition of the sewer has become a nuisance.—LINDSAY v. CITY OF SHERMAN, Tex., 35 S. W. Rep. 1019.

73. MUNICIPAL CORPORATIONS — Defective Streets—Negligence.—In an action against a city for injuries caused by piles of concrete gravel in the street it appeared that the accident occurred after dark, that during the day the velocity of the wind was from 20 to 28 miles an hour, that at about 5 o'clock p. m. the city caused an old lantern to be hung above the obstructions, and that there was no light at the time of the accident: Held, that whether defendant discharged its duty by placing such lantern on the obstruction was a question of fact for the jury.—SAUTHOF v. CITY OF PROVIDENCE, R. I., 35 Atl. Rep. 300.

74. MUNICIPAL CORPORATION—Street Improvements.—The action of the authorities of a municipal corporation in ordering street improvements is legislative in character, and the making of contracts and assessments for such improvements is ministerial, the assessment under the statute being merely an apportionment by the superintendent of the expense on property fronting on the street in accordance with the rule

fixed by the legislature, and they cannot, therefore, be reviewed by *certiorari*.—QUINCHARD v. BOARD OF TRUSTEES OF ALAMEDA, Cal., 45 Pac. Rep. 856.

75. NATIONAL BANKS—Agent to Succeed Receiver.—27 Stat. 345, ch. 360, § 3, authorizes the election of an agent by the stockholders of a national bank in the hands of a receiver when all indebtedness to outside creditors has been paid, and provides that such agent, after giving bond, shall be vested with the control of the bank's affairs by the controller and receiver, being accountable to the circuit or district court of the United States: Held, that such agent takes the place of the receiver, and is at least a *quasi* public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding.—CHETWOOD v. CALIFORNIA NAT. BANK OF SAN FRANCISCO, Cal., 45 Pac. Rep. 854.

76. NEGLIGENCE—Municipal Corporations—Defective Street.—It cannot be held as a matter of law that the driver of a horse injured in the darkness by reason of excavations in the street was guilty of contributory negligence because he drove over such street instead of another equally convenient.—CARSTESEN v. TOWN OF STRATFORD, Conn., 35 Atl. Rep. 276.

77. NEGLIGENCE—Fellow-servants.—A local telegraph operator at a station on the line of a railroad, who receives and delivers the orders of the train dispatcher in respect to the movement of trains, is the fellow-servant of the employees of the railroad company in charge of the train; and such employees, if injured in consequence of the negligence of the telegraph operator, cannot recover damages from the railroad company.—OREGON SHORT LINE & U. N. RY. CO. v. FROST, U. S. C. C. of App., 74 Fed. Rep. 965.

78. NEGLIGENCE—Comparative Negligence—Imputed Negligence.—In an action against a railroad company for injuries sustained by plaintiff while riding across a railroad track in a carriage driven by the employee of a livery stable, an instruction that if the accident was caused by the gross negligence of the driver of the carriage, and the persons in charge of the engine were guilty of only slight negligence, plaintiff cannot recover, was properly refused, as invoking the doctrine of comparative negligence.—TEXAS & P. RY. CO. v. CUELIN, TEX., 36 S. W. Rep. 1003.

79. NEGOTIABLE INSTRUMENTS.—Where, in an action on a note secured by a pledge of stock in a corporation, both parties request a sale of the stock, the admission in evidence of the certificate of stock, though not referred to in the pleading, is not error.—RATHBUN v. JONES, S. Car., 25 S. E. Rep. 214.

80. NEGOTIABLE INSTRUMENTS — Action for Interest.—Where the principal of a promissory note is payable at the end of a given term of years, but the note stipulates for the payment annually of the interest accruing thereon, any installment of interest past due, together with interest thereon, may be sued for and collected before the note, as to principal, has matured.—RAY v. PEASE, Ga., 25 S. E. Rep. 360.

81. NEGOTIABLE INSTRUMENT — Action on Note.—An action upon a negotiable promissory note payable to order, the title to which, by appropriate indorsement, has become vested in a named person as cashier, may be maintained by a bank of which this person was in fact cashier when the indorsement was made. The declaration in such a case ought to contain allegations showing that this person was such cashier, and that the ownership of the note sued upon was in the plaintiff. Its failure to contain such allegations, unless cured by amendment, renders it fatally defective, and advantage of its defects may be taken even at the trial term by a motion to dismiss.—HOBBS v. CHEMICAL NAT. BANK, Ga., 25 S. E. Rep. 348.

82. NEGOTIABLE INSTRUMENTS — Negotiability.—A mortgage note, providing for the payment by the maker of all taxes which may thereafter be authorized by statute to be assessed against the interest of the mortgagee, is not negotiable, the amount being uncertain.—CARMODY v. CRANE, Mich., 68 N. W. Rep. 268.

83. PARTNERSHIP — Notice of Dissolution.—Where, in the course of its regular business, a partnership had been accustomed to accept drafts drawn upon it by another, and to pay the same to a bank at which they had been regularly discounted, and the bank, within the knowledge of the partnership while yet existing, still held one or more of these drafts which had been accepted, but not paid, the bank was, under these circumstances, such a creditor of the partnership as to be entitled to actual notice of its dissolution.—CAMP v. SOUTHERN BANKING & TRUST CO., Ga., 25 S. E. Rep. 362.

84. PARTNERSHIP — Power of Partner to Bind Firm.—Where the president and cashier of a bank, being also members of a partnership composed of themselves and another person, to the capital stock of which they had, under the partnership articles, agreed to contribute a given sum, without the knowledge or consent of that person executed and delivered to the bank a promissory note in the name of the partnership for the purpose of raising the money they had so agreed to put into the partnership business, although the money obtained from the bank upon such note was in fact used for the purpose stated, the transaction was one for the private benefit alone of the two members of the partnership who thus raised the money, and in no sense for the benefit of the partnership itself.—BROBSTON v. PENNIMAN, Ga., 25 S. E. Rep. 350.

85. POWER OF ATTORNEY — Death of Principal.—A transfer of stock under a power of attorney after the death of the principal, which was known by the transferee, is invalid. A pledge of stock under a power of attorney for debts other than the principal's unauthorized by the power of attorney, which was seen by the pledgee, who also knew who owned the stock and who owed the debts, gives no lien.—IN RE KERN'S ESTATE, Penn., 35 Atl. Rep. 281.

86. PRINCIPAL AND AGENT — Ostensible Agents.—Plaintiff sold cattle to one claiming to be acting as agent for defendant, and paying by draft drawn on defendant. He had made similar sales previously, and the defendant had paid, and before the one in question the buyer had telegraphed defendant as to the price to be paid for a portion of the cattle, the message and answer being shown plaintiff. The cattle were received, and used by defendant, who refused, however, to pay the draft: Held, that without regard to the actual relations between defendant and the buyer, under Civ. Code, § 2300, providing that "an agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent," defendant was liable for the price of the cattle.—BUCKLEY v. SILVERBERG, Cal., 45 Pac. Rep. 804.

87. PRINCIPAL AND SURETY — Conditional Delivery.—Where a note was signed by defendant and others as sureties, with a written condition thereon that it should "not be delivered until 10 men of unqualified solvency shall have first signed it as sureties," with an agreement that the solvency of the signers should be passed on by one of the sureties, a delivery without compliance with such conditions was not binding on the sureties.—CAMPBELL PRINTING-PRESS & MANUF'G CO. v. POWELL, Tex., 36 S. W. Rep. 1005.

88. PRINCIPAL AND SURETY — Discharge of Surety.—Sureties on the liquor bond of a copartnership are discharged by a change in the membership of the firm.—MATHEWS v. GARMAN, Mich., 68 N. W. Rep. 248.

89. QUIETING TITLE — Possession of Land.—One having a deed and good title to a tract of land, and actual possession of a part of it, has constructive possession of the remainder, enabling him to maintain a suit to quiet title thereto, against one who, though having a deed giving him color of title thereto, and being in possession of other land included in his deed, has done nothing but irregular, occasional, or equivocal acts to oust the true owner.—GENTILE v. KENNEDY, N. Mex., 45 Pac. Rep. 879.

90. RAILROAD COMPANIES — Accidents at Crossings.—The liability of a railroad company for an injury at a

crossing where it omitted to give the statutory signals does not depend on whether or not such omission was the proximate cause of the injury, as, under Rev. St. § 1692, it is equally liable if it contributed thereto.—STROTHER v. SOUTH CAROLINA & G. R. Co., S. Car., 25 S. E. Rep. 272.

91. RAILROAD COMPANY — Injury to Personal Property.—Rev. St. 1893, § 1543, providing that a railroad corporation may sue and be sued "in any court of law or equity in this State," does not refer to the place of trial; and within Code, § 146, which provides that actions for injuries to personal property shall be tried in the county in which defendant resides at the time of the commencement of the action, a railroad corporation is a resident of a county where its line is located, and where it maintains a public office, and an agent upon whom process may be served.—TOBIN v. CHESTER & L. NARROW-GUAGE R. Co., S. Car., 25 S. E. Rep. 283.

92. RAILROAD COMPANIES — Negligence—Assumption of Risk.—The erection of a telegraph pole by a railroad company so near to a side track as to expose the employees to the risk of injury while performing their duties, is negligence. Injury from a telegraph pole erected dangerously close to a side track is not a risk assumed by a railroad employee, unless he has knowledge of the defect, or competent means of knowing it, and continues in the employment.—CRANDALL v. NEW YORK, N. H. & H. R. Co., R. I., 35 Atl. Rep. 307.

93. RAILROAD TICKET—Construction.—In construing a special contract embodied in a railroad ticket, and limiting the purchaser's rights, language of uncertain or doubtful meaning should generally be taken in its strongest sense against the company by which the ticket was issued and sold, and in favor of the purchaser.—GEORGIA RAILROAD & BANKING CO. v. CLARKE, Ga., 25 S. E. Rep. 868.

94. SALE — Estoppel. — Where a corporation obtains and keeps the proceeds of an unauthorized contract made by one of its officers, it is estopped to repudiate the contract. — CLEMENT, BANE & CO. v. MICHIGAN CLOTHING CO., Mich., 68 N. W. Rep. 224.

95. SALE OF LAND.—Under a contract of sale of land, declaring time the essence thereof, and providing that failure to make payment at a stipulated time shall release the seller from obligation to convey, and shall forfeit all right of the buyer to the property, the seller, by failure to tender deed on the day when the last payment falls due, does not lose his right to recover the land because of the non-payment.—HAILE v. SMITH, Cal., 45 Pac. Rep. 972.

96. SALE—Rescission of Contract.—One who had ample opportunity to examine the goods in exchange for which he conveyed land cannot have the deed rescinded because he overvalued the goods.—ADAMS v. PARDUE, Tex., 36 S. W. Rep. 1015.

97. TAXATION — Charitable and Benevolent Institutions.—Institutions where a general education is imparted to all who may apply, whose property has been acquired by gift, and from which no personal gain accrues, are "institutions of purely public charity, institutions of education, not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," within Const. § 170, and are exempt from taxation, though they are conducted by a particular sect or denomination.—CITY OF LOUISVILLE v. BOARD OF TRUSTEES, Ky., 36 S. W. Rep. 994.

98. TAXATION — Exemptions.—Laws 1893, No. 206, § 9, exempting from taxation so much of "the debts due or to become due as shall equal the amount of *bona fide* and unconditional debts" by the person owing, does not entitle a tax payer to a reduction on account of an unconditional liability under a lease for future payments of rent for a term continuing into the future.—BEECHER v. COMMON COUNCIL OF CITY OF DETROIT, Mich., 68 N. W. Rep. 237.

99. TRIAL—Jurors—Disqualification.—A juror whose deceased wife had been a second cousin of the accused in a criminal case was not disqualified from serving on the trial thereof unless the deceased wife left issue; and where, on such trial, the State alleged the incompetency of the juror, on the ground that he was related by affinity to the accused, it carried the burden of showing that the former relationship was still subsisting, by proving affirmatively that the deceased wife did in fact leave issue.—MILLER v. STATE, Ga., 25 S. E. Rep. 366.

100. TRUST — Resulting Trusts. — Where a wife turns over to her husband money received from her father's estate, without any agreement for its investment, the fact that the husband subsequently informs the wife that he has invested it in certain land for her, whereas he had not, but had taken title thereto in himself, is insufficient to create therein a resulting trust in favor of the wife.—NASHVILLE TRUST CO. v. LANNOM'S HEIRS, Tenn., 36 S. W. Rep. 977.

101. VENDOR AND PURCHASER—Specific Performance. —Where one entitled to a conveyance from another of realty, or an interest therein, upon the payment of a given sum, tendered at the proper time that sum to the latter, which he then refused to accept, and subsequently denied the existence of any contract binding him to convey at all to the person making the tender, such persons could maintain his equitable petition for specific performance; and, if the petition contained an offer to pay the amount which the plaintiff was due to the defendant, or for which he should be held liable, when the amount so due was fixed and ascertained by the decree to be rendered, this was sufficient without actually producing the money and paying it into court.—KERR v. HAMMOND, Ga., 25 S. E. Rep. 337.

102. WATER COMPANY — Contract — Cancellation.—A contract by which a company agrees to construct waterworks and furnish a borough and its inhabitants with an adequate supply of water, all to be taken from springs and certain land, will not be canceled merely because the springs prove inadequate, mistake as to the capacity of the springs having been no more the fault of the company than of the borough.—BOROUGH OF DU BOIS v. DU BOIS CITY WATERWORKS CO., Penn., 35 Atl. Rep. 248.

103. WATER COURSES — Diversion of Water.—Where the volume of water furnished by a stream is barely sufficient to sustain the stock of complainant, a lower proprietor of lands, of defendant, an upper proprietor, and other riparian proprietors along the stream, and to supply proprietors with water for their natural wants and for domestic use, defendant will be enjoined from diverting water from the stream for the purposes of irrigation. — MASTENBROOK v. ALGER, Mich., 68 N. W. Rep. 213.

104. WILLS—Construction—Life Estate.—Under the provisions of a will, in terms, "all the rest and residue of my estate, both real and personal, and wherever situated, I give, devise, and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions or limitations whatsoever," followed by provisions that after the death of the wife, and the payment of her debts and settlement of her estate, whatever property might remain should pass to a trustee for final distribution as directed, only a life estate vested in the widow of the testator, and hence the subsequent provisions of the residuary clause were valid and operative.—MANSFIELD v. SHELTON, Conn., 35 Atl. Rep. 371.

105. WILLS—Rule in Shelley's Case.—A devise in trust of a beneficial interest for life, subject to the discretion of the trustee, with power in the beneficiary to direct its disposition by will after his death, and in default thereof to his heirs at law, is within the rule in Shelley's Case, and carries an equitable fee in the estate held by the trustee, and entitles the beneficiary to a conveyance of the legal estate, in the absence of any reason why the trust should be retained.—COWING v. DODGE, R. I., 35 Atl. Rep. 309.